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SUPREME COURT, U. S.

No. 73-487

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES WESLEY BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on four counts of having wilfully failed to file federal income tax returns for the years 1967 through 1970, in violation of Section 7203 of the Internal Revenue Code of 1954. The court of appeals affirmed the conviction as to three of the counts but reversed as to the count for 1970 on the ground of insufficiency of evidence (Pet. App. 1-8).

Citing this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, petitioner's sole contention here (Pet. 7-12) is that his motion in the district court to suppress certain oral statements made by him to special intelligence Internal Revenue Service agents in their office should have been granted, because the agents did not fully warn him of his constitutional rights.

Petitioner does not dispute the fact that a warning was given. Specifically, the agents warned petitioner before the interview that he could not be compelled to answer any questions or furnish any information if such answers or information tended to incriminate him; that any statements or information provided could be used against him in a criminal proceeding; and that he was entitled to the assistance of counsel. He was not, however, advised that he could have an attorney appointed to represent him if he could not afford counsel (Pet. App. 3). Nevertheless, petitioner was free to leave at any time during the interview; he fixed the terms and conditions of the interview, and in fact stated that he had counsel available and would reserve his answers until he had consulted his lawyers (Pet. App. 4). Under these circumstances, the court of appeals concluded (Pet. App. 4) that "[s]ince he had lawyers, and since his right to consult them was conceded, we see no necessity for the agent's warning him as to his right to have counsel appointed."

Contrary to petitioner's contention, the requirements of *Miranda* have generally been held inapplicable to the kind of intervew here conducted, because the taxpayer is neither in custody nor otherwise deprived of his freedom in any significant way during the interview. See *Morgan* v. *United States,* 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White,* 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz,* 433 F. 2d 415, 417-420 (C.A. 3); *United States* v. *Mancuso,* 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States,* 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani,* 422 F. 2d 150, 153-154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States,* 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States,* 389 F. 2d 498 (C.A. 9).

However, petitioner contends (Pet. 7-8) that the decision below conflicts with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). In that case, agents of the Intelligence Division of the Internal Revenue Service interviewed the taxpayer on six separate occasions in a noncustodial setting, without advising him of his constitutional rights. The Seventh Circuit held prospectively that *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division " (413 F. 2d at 1117). Its conclusion was based upon its appraisal that incriminating statements had been "elicited * * * upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so * * *" (*id.* at 1116).

Whatever conflict there may be between *Dickerson* and the vast weight of other appellate authority, the facts of this case take it outside the ambit of any possible conflict. Petitioner received virtually the full *Miranda* warning, and his statement to the agent that he had engaged counsel eliminated, as a practical matter, the need for advice of his right to have counsel appointed. Under similar circumstances, even the Seventh Circuit has recently held in *United States* v. *Krowczyk*, 483 F. 2d 1406, pending on petition for a writ of certiorari, No. 73-646, that it is unnecessary to advise an interrogee who already has counsel that counsel may be appointed for him if he cannot afford counsel.[1]

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[1] Petitioner's reliance (Pet. 9) upon *Mathis* v. *United States*, 391 U.S. 1, is misplaced. There, as in *Miranda*, the defendant was in custody at the time of the interrogation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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